In the Supreme Court of the United States

No. 78-1657
Spring Term, 1979

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Petitioner

vs.

PITTSBURGH PRESS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

Brief For Respondent In Opposition

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2. Does a state statute which prohibits individual advertisers who seek employment from publishing or causing to be published advertisements which "in any manner express" their race, color, religious creed, ancestry, age, sex or national origin constitute an impermissible prior restraint on protected speech?

3. Did the Pennsylvania Supreme Court correctly balance the First Amendment rights of individuals who seek employment through situation-wanted advertisements against the interest of the state government in prohibiting employment discrimination?

COUNTERSTATEMENT OF THE CASE

The Pennsylvania Human Relations Commission has petitioned for review of the opinion and order of the Pennsylvania Supreme Court of January 24, 1979 affirming a unanimous decision of the Commonwealth Court of Pennsylvania which declared unconstitutional that portion of Section 5(g) of the Pennsylvania Human Relations Act which prohibits the publication of advertisements for employment which express the race, color, religious creed, ancestry, age, sex or national origin of the advertiser. 43 P.S. §955(g). The Pittsburgh Press had been charged with aiding and abetting the advertisers in violation of Section 5(g) by printing "situation-wanted" advertisements in its Classified Advertisement pages. 43 P.S. §955(e).

The "Situation-Wanted" classification is a section in which persons seeking employment describe themselves and/or the type of job which they are seeking and is printed as a public service to individuals seeking employment and to prospective employers. The Press accepts and publishes the information as submitted by the advertiser. It does not maintain sex-based headings or any other discriminatory headings or make any change in the content of the advertisements.

On June 27, 1975 the Pennsylvania Human Relations Commission issued a final order requiring the Press to cease and desist from publishing "situation-wanted" advertisements in which an individual specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin. The Commission recognized that the Press takes no part in the wording of the advertisements, but found offensive the individual advertiser's personal references. Examples of advertisements objected to by the Commission did not state discriminatory preferences, but only indicated the advertiser's sex, race, religion or age.

The Pennsylvania Commonwealth Court, by its unanimous opinion of July 21, 1977, reversed the Commission's Order. The Court held that Section 5(g) of the Pennsylvania Human Relations Act violated the First Amendment by prohibiting the free flow of legitimate commercial speech without furthering the Commonwealth's interest in eradicating employment discrimination.

The Pennsylvania Supreme Court, by opinion and order filed January 24, 1979, affirmed the order of the Commonwealth Court, finding that the prior restraint of Section 5(g) of the Act was not necessary to promote the state interest involved. The Court held that the restriction imposed by Section 5(g) went beyond that which has been permitted by this Court in the regulation of commercial speech since it went directly to the content of the advertisements and since the advertisements themselves do not promote illegal transactions.

Petitioner has petitioned this Court for writ of certiorari to the Supreme Court of Pennsylvania.

REASONS FOR DENYING THE WRIT

A. "Situation-Wanted" newspaper advertisements which identify personal qualifications and characteristics of the advertisers are protected by the First Amendment to the United States Constitution.

The Pennsylvania Supreme Court has properly applied the "commercial speech" doctrine evolved by this Court and has properly concluded that situation-wanted advertisements are protected by the First Amendment. The decisions of this Court have substantially eroded the commercial speech doctrine propounded in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) which held that speech was unprotected if it proposed a commercial transaction rather than communicating an idea. That erosion culminated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) in which the Court held that commercial speech is not totally outside the protection of the First Amendment no matter how mundane its subject matter.

The information sought to be suppressed by Section 5(g) of the Pennsylvania Human Relations Act is communication of an individual's identity and qualifications for employment. While the advertisements are commercial to the extent that they propose commercial transactions, the speech is a fundamental individual expression of identity the suppression of which has never been tolerated by this Court. The commercial transaction sought is the securing of employment, the most important commercial endeavor of an individual's life.

Although the Order of the Pennsylvania Human Relations Commission in this case applies only to classified situation-wanted advertisements in a newspaper, Section 5(g) of the Act makes no such distinction and carries no such

limitation. It applies to "any advertisement". Thus, it would apply equally to other types of newspaper advertising as well as to billboards, posters, bumper stickers, mailed circulars, and professional newsletters that carry biographical information about job-seeking individuals. Even individual mailings advertising the proscribed information would be placed in jeopardy. It is inconceivable that such a ban could be held to be constitutional.

Petitioner here argues that the situation-wanted advertisements fall into a category of commercial speech which was found to be outside of First Amendment protection in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (hereinafter "*Press I*"). That category of speech consists of advertising which proposes an illegal transaction. In that case this Court upheld an ordinance forbidding newspapers to publish help-wanted advertisements in sex-designated columns. In *Press I* the Court found that the Press actively assisted employers in publishing their employment preferences by maintaining the sex-designated columns and by encouraging advertisers to place their advertisements under particular headings. The Press did not challenge that portion of the ordinance which prohibited the publication of discriminatory employment preferences. The Court had only to decide whether the maintenance of sex-designated columns by the Press aided and abetted that illegal advertisement. In this case, the Press challenged the constitutionality of the statute which prohibits expression of one's own personal characteristics. Therefore, the "illegality" argument of *Press I* is not controlling.

The Pennsylvania Supreme Court properly distinguished this case from *Press I*, holding that the "illegality" test did not apply.

> "In contrast to the advertising employer's illegal, sex-based, employment discrimination in Press I, in the

instant case the advertisers are prospective employees proposing commercial transactions—their own employment—which are not illegal. By its terms, the Act applies to employers, and those who aid and abet employers to practice employment discrimination. . . . In the present case the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers." A. 37a-38a

In its holding the Pennsylvania Supreme Court recognized the fundamental difference between this case and *Press I*. The Act prohibits discrimination by employers. To that aim, it prohibits the publication of unlawful discriminatory preference by employers. The Act does not regulate individuals in their selection of employment. It is not illegal to publish one's own personal identity and characteristics. Therefore, that publication cannot be part of the "illegality" theory of *Press I* which would remove the publications from First Amendment protection. No illegal transaction is proposed.

The decisions of this Court which have continued to broaden the protections afforded commercial speech would not permit restraints on an individual's expression of personal identity published by a newspaper as part of the advertiser's legitimate quest to obtain employment. The Pennsylvania Supreme Court properly applied the doctrine of this Court. Further review should not be granted.

B. **A state statute which prohibits individual advertisers who seek employment from publishing advertisements which "in any manner express" their race, color, religious creed, ancestry, age, sex or national origin constitutes an impermissible prior restraint on protected speech.**

Petitioner contends that Section 5(g) is not an unconstitutional prior restraint of unprotected speech because it

would merely replace the prohibited language in the advertisements with that which has been cleansed of references to race, sex, religion, age or ancestry. Petitoner further contends that the absence of summary contempt power eliminates any unconstitutional restraint on protected speech. Petitioner misapprehends the prior restraint concept.

This Court has stricken vague and overbroad statutes which would inhibit the cautious speaker from engaging in protected speech. *Smith v. California*, 361 U.S. 147 (1959); *Near v. Minnesota*, 283 U.S. 697 (1931). The chilling effect on protected speech has been enough to invalidate restrictive statutes. The doctrine has been extended into the commercial speech area as that form of speech has acquired greater First Amendment protection. In *Press I*, *supra* at 390, the Court specified that the ordinance in question did not create a prior restraint only because it outlawed a "continuing course of repetitive conduct," *i.e.*, the publication of sex-designated columns. In the present case, the contents of the advertisements would have to be constantly and carefully censored to eliminate the allegedly offensive language. That censoring would undoubtedly chill protected speech by requiring such subtle determinations as whether publication of one's name would offend the law by revealing one's sex. Excessive caution would inevitably be exercised since offensive language is often indistinguishable from the legitimate.

In another commercial speech decision, *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975) this Court held that imposing a prior restraint on a newspaper by controlling the content of its advertisements is particularly offensive to the First Amendment.

> "The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The

prosecution thus incurred more serious First Amendment overtones."

Petitioner's argument concerning the absence of summary contempt proceedings for violation of the Commission's Order mocks the prior restraint principle. The self-imposed censorship which constitutes an unconstitutional prior restraint of expression is not affected by the justice of the contempt proceeding nor by the availability of judicial review. So long as a fear of penalty chills free expression, there is a prior restraint.

Petitioner argues that in order for the interest of the Commonwealth to be served, the information conveyed in the advertisements must be stopped at its source since the reaction to that information by potential employers cannot be measured. (Petition at p. 19-21) That argument in itself raises the spectre of prior restraint. Since some information may be used unlawfully, all information will be suppressed. This prior restraint would not be created merely by a chilling effect, but by statutory design.

Petitioner's reference to the Court's note in *Virginia Pharmacy Board, supra* at 771-72, n. 24, which was quoted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977) is inapposite to the case sub judice. In those cases, the Court noted the durability of commercial speech and reasoned that a prior restraint may not unduly inhibit protected speech in the advertising context for the reason that the truth concerning the product is known by the advertiser and he can easily make the determination whether an advertisement is protected. That reasoning does not apply here. The situation-wanted advertisements were not outlawed for containing false or misleading information but rather because of the reactions it was *assumed* would be made by those who read the advertisements. The advertiser seeks to publish factual information about himself. That factual information will

communicate essential job qualifications and will enable the prospective employer to contact him. Information as fundamental as the advertiser's name may offend Section 5(g) by relating the individual's sex or national origin. Indicating years of experience in an occupation or date of college graduation may indicate age. The advertising is not durable as that term was used in *Virginia Pharmacy Board, supra,* where virtually every element of the advertisement is subject to scrutiny by the Commission and where the truth of the advertisement is of no defense. The careful editing which would be required to cleanse an advertisement may well discourage an advertiser from submitting an advertisement or a newspaper from maintaining the column.

Section 5(g) and the enforcing Order of the Pennsylvania Human Relations Commission represented the sort of prior restraint of free expression which has never been condoned by this Court. The subtleties of the law and the guesswork required to edit an advertisement to conform to the Commission's interpretation of the law present a most effective framework for self-censorship which go far beyond the chilling effect which has been held adequate to lead this Court to strike a restrictive statute. The Pennsylvania Supreme Court properly interpreted the decisions of this Court in striking Section 5(g) of the Pennsylvania Human Relations Act.

C. The Pennsylvania Supreme Court correctly balanced the First Amendment rights of individuals who seek employment through situation-wanted advertisements against the interest of the state government in prohibiting employment discrimination.

The Pennsylvania Supreme Court correctly applied the balancing test developed by this Court to determine the constitutionality of a regulation of commercial speech. *Bigelow v. Virginia, supra* at 826. The court reasoned that knowledge

of the forbidden criteria of which advertisements would be purged by Section 5(g) could be readily obtained by the employer by scheduling a pre-employment interview or by requesting submission of an employment resume. Infringement on the freedom to publish those characteristics for legitimate purposes is not justified where the effect on the goal of equal employment opportunity is merely speculative and the restrictive statute is so easily circumvented. The court held:

> Any effect that enforcement of Section 5(g) might have on reducing employment discrimination made illegal by Section 5(e) is thus too speculative to justify Section 5(g)'s direct restriction on the advertiser's freedom of expression. A.38a

The Pennsylvania Supreme Court applied the correct test to Section 5(g) and applied it in a manner consistent with recent applications by this Court. The balance was similar to that derived in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, (1977) in which the Court declared unconstitutional a township ordinance prohibiting the posting of "For Sale" signs in an effort to stem white flight from residential communities and promote racial integration. The Court found the relationship too speculative to justify suppression of speech. As in the present case, the relationship between the speech and the state interest rested on the substantial assumption that those who received the information would act on it in a certain undesirable way. This Court held in *Linmark, supra* at 92, n. 6:

> "After *Virginia Pharmacy Bd. [v. Virginia Consumer Council*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'"

This Court has consistently refused to suppress commercial speech where the relationship to the state's regulatory interest is merely speculative. In *Virginia Pharmacy, supra*, the state argued that the prohibition of advertising prescription drug prices was necessary to maintain the professionalism of its licensed pharmacists. The Court would not interfere with the free flow of truthful commercial information on the basis of speculation that unscrupulous pharmacists could use advertising to cheat the public.

> "The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information." 425 U.S. at 769.

In *Virginia Pharmacy, supra*, the Court noted that the advertising ban would not necessarily prevent pharmacists from cutting corners if they were so inclined. In this case, the employer who wishes to discriminate need only telephone the advertiser, or request an interview or a resume to discover the forbidden criteria. As in *Virginia Pharmacy, supra*, the public interest in the free flow of information outweighs the speculative harm especially where the ban will not eliminate the evil.

Similarly, in *Bates v. State Bar of Arizona, supra*, the Court upheld the right of lawyers to advertise, finding the postulated connection between the advertising ban and the state interest to be "severely strained." 433 U.S. at 368.

Balanced against the unsubstantiated belief of a determental impact upon equal employment opportunity in this case is not only the value of individual expression for its own sake, but the individual's interest in obtaining employment. The newspaper is the only practical means to reach unknown prospective employers. The Pennsylvania Commonwealth Court recognized the "additional element of import" which attaches to advertisements placed to gain employment.

> "We are dealing with the efforts of individuals to sell the only thing that they have to offer: their labor. For the users of the situation wanted column, often the least skilled and most desperate job-seekers, the quest for employment may cause the liveliest political or social controversy of the day to shrink to insignificance by comparison." 31 Pa. Cmwlth. at 230, A. 23a

In the balancing analysis in *Virginia Pharmacy, supra,* the Court reasoned that the advertising ban would harm those it was designed to protect: the poor, the sick and the aged. A proportionately large amount of their income is spent on prescription drugs and yet they are the least able to comparison shop. That same analysis applies in this case. The neutralization of situation-wanted advertisements would prevent minority advertisers from reaching employers who are actively engaged in affirmative action. It is these individuals whom the Pennsylvania Human Relations Act is designed to protect and it is these individuals, often economically disadvantaged, who are most dependent on the newspaper as an inexpensive vehicle for advertising their availability for employment.

The Pennsylvania Supreme Court properly found that the interest of the individual in free expression outweighed the speculative interest of the state. It was a balance consistent with the holdings of this Court. Review by this Court would not affect the state of the law of commercial speech.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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